

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**NICHOLAS LINTON, BY AND
THROUGH HIS MOTHER AND
NEXT FRIEND, ARICA LINTON**

APPELLANTS,

**v.
AMY S. CARTER, D.O. AND FERNS,
MATILE PERRYMAN & MOORE,
ET AL.,**

RESPONDENTS.

DOCKET NUMBER WD82637

DATE: November 10, 2020

Appeal From:

Jackson County Circuit Court
The Honorable Bryan Round, Judge

Appellate Judges:

Division Two: Mark D. Pfeiffer, Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

Attorneys:

Paul L. Redfearn and Michael D. Wallis, Kansas City, MO, for appellants.

Bruce Keplinger and Mark A. Lynch, Overland Park, KS, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**NICHOLAS LINTON, BY AND THROUGH HIS MOTHER AND NEXT FRIEND,
ARICA LINTON, APPELLANTS,**

v.

**AMY S. CARTER, D.O. AND FERNS, MATILE PERRYMAN &
MOORE, ET AL., RESPONDENTS.**

WD82637

Jackson County

Before Division Two Judges: Mark D. Pfeiffer, Presiding Judge, Alok Ahuja, Judge, and Gary D. Witt, Judge

Nicholas Linton ("Nicholas") appeals from the judgment of the Circuit Court of Jackson County, which following a jury trial found in favor of Respondents Dr. Amy Carter ("Dr. Carter"), Ferns, Matile, Perryman, and Moore ("Ferns"), Dr. Scott Gray ("Dr. Gray"), and Saint Luke's Hospital of Kansas City ("St. Luke's") (collectively "Respondents"). On appeal, Nicholas asserts the trial court erred in its application of section 490.065.2, RSMo, in that the trial court admitted the opinion testimony of a medical expert that was not stated within a certain degree of medical certainty.

On April 7, 2008, Arica Linton ("Arica") was 29.5 weeks pregnant with Nicholas, and she presented to St. Luke's in pre-term labor. Dr. Carter treated Arica and Nicholas and attempted to stop Arica's labor and administered steroids to encourage Nicholas's lung development. Dr. Gray determined that Nicholas was in a breeched position with his umbilical cord around his neck. Dr. Gray recommended that Nicholas be delivered as soon as possible by a Caesarean section.

St. Luke's has three procedure rooms appropriate for Caesarean sections, and its practice is to keep one room available for emergency Caesarean sections. Two of the rooms were in use, and Dr. Carter did not declare an emergency and waited for one of them to become available. In the meantime, Arica's amniotic membranes ruptured and compressed the umbilical cord, and at that point, Dr. Carter used the remaining Caesarean procedure room. During the delivery, Nicholas sustained a laceration to his leg that required a subsequent surgery.

Following his birth, Nicholas was diagnosed with Periventricular Leukomalacia ("PVL"), a brain injury which impacts his ability to move his upper and lower extremities. Nicholas asserts that his injuries resulted from the compression of his umbilical cord, which deprived him of oxygen prior to birth. The Respondents presented various expert witnesses that opined that Nicholas's injuries were caused by alternative means.

The sole issue on appeal is whether the testimony of Respondents' expert witness, Dr. William Rhine ("Dr. Rhine") was admissible. He testified in a deposition as follows:

[Lintons' Counsel]: Do you have an opinion based upon a reasonable degree of medical certainty as to whether Nicholas Linton suffered [PVL] or injury to the white matter of his brain before birth?

[Dr. Rhine]: No.

Q. Do you have an opinion based upon a reasonable degree of medical certainty as to whether he suffered injury. Suffered [PVL] or injury to the white matter in his brain after the birth?

A. No. I know it's one of the two. I know it's one of the two, either before or after or a combination.

Q. Do you have an opinion that you can state to a reasonable degree of medical certainty whether it is before or after or a combination?

A. Nope.

Based on this deposition testimony, Nicholas filed a motion *in limine* to preclude Dr. Rhine's alternative causation testimony on the grounds that his opinions were not stated to a reasonable degree of medical certainty. Respondents argued that their experts were not "governed by the same rule" as an expert of the party with the burden of proof on the issue of causation.

Dr. Rhine testified at trial, over objection, as to "what *could* be" the source of Nicholas's injuries. When asked about other possible sources of his injuries, Dr. Rhine stated, "So I wish I could tell you with certainty that I knew exactly where his white matter injury comes from, but I can't and I don't think anybody can." He then speculated as to other possible causes including placental abnormalities, an episode of low blood pressure during subsequent surgery to repair Nicholas's leg, or the use of general anesthesia.

In closing argument, the Respondents focused almost exclusively on the issue of causation and emphasized that Dr. Rhine was the only neonatologist who had testified for any party in the case and focused the jury on his testimony regarding "alternative possible causes" of the PVL injury.

The jury returned a verdict in favor of the Respondents.

REVERSED AND REMANDED.

Division Two Majority holds:

(1) The trial court abused its discretion in admitting Dr. Rhine's testimony because it was not stated within a degree of medical certainty. Missouri's rules of evidence are applicable to all parties in a civil action regardless of the parties' burden of proof on a given issue.

(2) Because Dr. Rhine's testimony was improperly admitted, the Lintons suffered prejudice in that his testimony was likely to mislead lay jurors regarding complex scientific or medical concepts. Furthermore, Respondents highlighted and focused on Dr. Rhine's testimony and the fact he was the only neonatologist to testify at trial encouraging the jury to rely on his inadmissible testimony in reaching their verdict.

Judge Ahuja's Dissenting Opinion States:

The dissent would hold that Dr. Rhine testified to a reasonable degree of medical certainty that a specific list of factors had caused Nicholas Linton's injuries, acting alone or in combination. Such alternative-possible-cause testimony has specifically been endorsed by the Missouri Supreme Court, by this Court, and by state and federal courts across the country. Even if admission of Dr. Rhine's testimony was erroneous, its admission cannot justify reversal of a jury verdict reached after a two-week trial, where the Linton's challenge only a portion of Dr. Rhine's testimony, he was merely one of five defense causation experts, and where another defense expert offered virtually identical testimony without objection.

Majority Opinion by: Gary D. Witt, Judge
Mark D. Pfeiffer, Presiding Judge, concurs

November 10, 2020

Dissenting Opinion by: Alok Ahuja, Judge

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